No. 12523

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

OSCAR R. EWING, FEDERAL SECURITY ADMINISTRATOR,

Appellant,

vs.

ARCHIE F. McLEAN,

Appellee.

Brief of Appellee

On Appeal from Judgment of the United States District Court for the District of Idaho, Southern Division.

HONORABLE CHASE A. CLARK, *District Judge*

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GATEWAY PRINTERS — POCATELLO

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STATEMENT OF THE CASE

Archie F. McLean, a laborer, who attained the age of sixty-five years in 1945, made application to the Bureau of Old Age and Survivors Insurance of the Social Security Board for benefits under the insurance provisions of the Social Security Act. The Bureau refused to allow credits for services performed by him for Albert Miller and Company at Burley, Idaho. McLean then filed a request for a hearing before a referee of the Social Security Board. A hearing was had (at which McLean was not represented) at Burley, Idaho, on March 26, 1946, and thereafter a deposition was taken before one Oscar M. Sullivan in Chicago, Illinois, at the taking of

which McLean was not represented. The referee rendered his decision disallowing credits for the services performed by the appellee for Albert Miller and Company at Burley, Idaho, during the years of 1941 and 1942. From this decision, McLean (still being unrepresented) filed an appeal to the Appeals Council and, on July 2, 1948, the Appeals Council affirmed the ruling of the referee and refused to allow credits for the services performed by the appellee for Albert Miller and Company in the years 1941 and 1942. Thereafter McLean instituted this action under the provisions of subsection (g) of Section 405, Title 42, U. S. C. A.

By his amended complaint he alleges that he earned, during the calendar quarter ending December 31, 1941, the sum of $110.25; during the calendar quarter ending March 31, 1942, the sum of $257.33; during the calendar quarter ending June 30, 1942, the sum of $141.35; during the calendar quarter ending September 30, 1942, the sum of $133.12; during the calendar quarter ending December 31, 1942, the sum of $356.98, and during which time the plaintiff was employed by Albert Miller and Company in Burley, Idaho, and that the services rendered by the plaintiff to Albert Miller and Company during the periods aforesaid were as follows:

(a) feeding potatoes into sorter and washer;

(b) working on sorting table;

(c) removing bags from sorting machines; and

(d) assisting in loading railroad freight cars and as-

sisting in loading trucks and other vehicles from the warehouse.

That he performed four full quarters of work for and on behalf of Albert Miller and Company at its warehouse at Burley, Idaho, and, in addition to the services rendered by the plaintiff to said Albert Miller and Company, the plaintiff performed services for other employers, which employment was covered by the Social Security Act, constituting thirteen (13) quarters on the 20th day of November, 1945, at which time the plaintiff ceased to be employed and upon said date the plaintiff was eligible to the benefits of the Social Security Act.

He further alleged that he made application to the Social Security Administration for the benefits accruing to him under the provisions of the Social Security Act by reason of his employment for the period of seventeen (17) quarters prior to ceasing his employment and after having reached the age of sixty-five years.

That thereafter a hearing was had upon the appellee's application for benefits under the Social Security Act and, on the 8th day of July, 1946, Martin Tieburg, referee, held that the appellee was not entitled to receive the benefits of the Social Security Act for the reason and upon the ground that the services performed by the appellee for Albert Miller and Company were exempted from the Social Security Act under the provisions of Section 209 (1) (4), 42 U. S. C., and that the warehouse of Albert Miller and Company in Burley,

Idaho, where the plaintiff was employed, did not constitute a terminal market within the meaning of that section of the Social Security Act and that the operations performed by the company in its Burley warehouse were performed as an incident to the preparation of potatoes for market.

Plaintiff further alleged that Albert Miller and Company at Burley, Idaho, was engaged in the business of purchasing potatoes from farmers for the purpose of reselling, either in inter-state commerce or locally, from its warehouse at Burley, Idaho, and that after the purchase of the said potatoes from the farmers, Albert Miller and Company transported said potatoes to its warehouse at Burley, Idaho, where said potatoes were sorted, washed, sacked according to grade, and thereafter resold by Albert Miller and Company, either in inter-state commerce or locally; and that at the time the plaintiff performed his services for and on behalf of the said Albert Miller and Company, the farmers had parted title in said potatoes and had no further interest therein, and that the warehouse operated by the said Albert Miller and Company at Burley, Idaho, was both a "growers market" and a "terminal market" within the provisions of Section 409 (1) (4), Title 42, U.S.C.A., and that the said warehouse was a place where the farmers customarily parted with all their economic interest in said potatoes, their future form or destiny, and that when the said potatoes reached the said warehouse, the said warehouse was then in the practical control of Albert Miller and Company, a selling organization, and that the said Albert Miller and Company operated the said warehouse at Burley, Idaho, as a purely commercial operation in the business of

buying potatoes from farmers and thereafter selling said potatoes for private profit, after the said company had sorted, cleaned, packed, and otherwise processed the said potatoes, and that the services performed by the plaintiff during the period of time alleged were not "agricultural" services within the meaning of Section 409 (1) (4) of the Social Security Act, Title 42, U.S.C.A.

That the decision of the Appeals Council of the Social Security Administration of the United States rendered on the second day of July, 1948, was contrary to law in refusing to compute the monthly benefits payable to the plaintiff under the Act and to declare the plaintiff to be eligible thereto, and in eliminating as excepted employment under the Social Security Act the services performed by the plaintiff for Albert Miller and Company at its warehouse at Burley, Idaho, and prayed that the decision of the Appeals Council of the Social Security Administration of the United States be reversed and this cause be remanded with directions to the said Appeals Council to compute the benefits to which the plaintiff is entitled under the Social Security Act and in so doing to include the payments, amounting to $999.03, made to the plaintiff by Albert Miller and Company in the alleged quarters as a part of his total wages in determining the amount of his primary insurance benefits, as provided by Section 409 (e) (f), Title 42, U.S.C.A., and that the plaintiff be declared to be entitled to the benefits of the Social Security Act from and after the 20th day of November, 1945, and for such other and further relief in the premises as equity and the court should deem appropriate.

POINTS AND AUTHORITIES

I.

The appellee, Archie F. McLean, was not engaged in agricultural labor during the last quarter of 1941 and the year 1942, for

A. The services were not performed as an incident to ordinary farming operations.

Supp. Tr. 138.

Supp. Tr. 141.

Supp. Tr. 157.

B. The services were not performed as an incident to the preparation of vegetables for market, because

1. Appellee was employed by Albert Miller & Co.

2. Albert Miller & Co. was not engaged in farming or farming operations.

Supp. Tr. 140.

3. Albert Miller & Co. was engaged in buying, storing and selling potatoes as a commercial business, for profit.

Supp. Tr. 84.

Supp. Tr. 90.

Supp. Tr. 115.

Supp. Tr. 116.

Supp. Tr. 138-139.

Supp. Tr. 153-154.

Cowiche Growers, Inc. vs. Bates, (Wash.) 117 Pac. (2nd) 624.

4. The potatoes had been prepared for market and had entered the commercial market prior to the time that the appellee did any work on them, because

(a) The potatoes were sorted into U. S. No. 1 and U. S. No. 2 grades before they entered the Miller warehouse.

Supp. Tr. 113.

Supp. Tr. 157-158.

Supp. Tr. 155

(b) The title to the potatoes had passed to Albert Miller & Co. before they entered the warehouse.

Supp. Tr. 154-155.

Supp. Tr. 158.

Supp. Tr. 162.

Supp. Tr. 114.

Johnson vs. Besoyan, (Cal.) 193 Pac. (2nd) 63.
Idaho Code, Sec. 64-203.

(c) When the product of the soil leaves the farm, as such, and enters a factory for processing and marketing it has entered upon the status of industry.

North Whittier Heights Citrus Ass'n. vs. National Labor Relations Board, 109 Fed. (2nd) 76.

In Re Yakima Fruit Growers Ass'n., (Wash.), 146 Pac. (2nd) 800.

California Employment Comm. vs. Butte County Rice Growers Ass'n., (Cal.), 154 Pac. (2nd) 892.

(d) Warehouse crews which go to different farms and to dealers' warehouses and prepare potatoes for movement into market are not agricultural laborers.

Idaho Potato Growers vs. National Labor Relations Board, 144 Fed. (2nd) 295.

II.

The warehouse owned by Albert Miller & Co. at Burley, Idaho, was a terminal market for potatoes, for

A. Albert Miller & Co. purchased and owned all potatoes that were taken into, stored, graded and sorted in its warehouse.

Supp. Tr. 113-114.

Supp. Tr. 158.

Miller vs. Burger, 161 Fed. (2nd) 992.

Miller vs. Bettencourt, 161 Fed. (2nd) 995.

Idaho Potato Growers vs. National Labor Relations Board, 144 Fed. (2nd) 295.

Producers Crop Imp. Ass'n. vs. Dallman, 178 Fed. (2nd) 66.

B. Albert Miller & Co. sold to consumers the potatoes that it purchased and stored and sorted in its warehouse at Burley.

Supp. Tr. 115.

Supp. Tr. 117.

Cowiche Growers, Inc. vs. Bates, (Wash.) 117 Pac. (2nd) 624.

In Re Yakima Fruit Growers Ass'n., (Wash.) 146 (2nd) 880.

C. The farmer or grower had no control over the potatoes after they were delivered to the Miller warehouse.

Supp. Tr. 114.

Latimer vs. United States, 52 Fed. Supp. 228.

South Dakota Wheat Growers Ass'n. vs. Farmers' Grain Co., (S. D.) 237 N. W. 723, 725.

Cowiche Growers, Inc, vs. Bates, (Wash.) 117 Pac. (2nd) 624.

III.

In construing legislation such as the Social Security Act, it is axiomatic that the court should be liberal in its interpretation, and it is free to make its own determination of the scope of the statute.

Baiocchi v. Ewing. 87 Fed. Supp. 520.

Social Security Board vs. Nierotko, 327 U. S. 358; 66 S. Ct. 637; 90 L. Ed. 718.

IV.

The case should not have been remanded to the Administrator to take additional testimony or make additional findings of fact, for

A. The Court may affirm, modify or reverse the decision of the Board (Administrator) with or without remanding the case for rehearing.

Title 42 U. S. C. A., Sec. 405 (g).

Patton vs. Federal Security Agency, 69 Fed. Supp. 282.

ARGUMENT

STATUTES

This action was brought under the provisions of subsection (g) of Section 405, Title 42, U. S. C. A., which provides as follows:

> "(g) Any individual, after any final decision of the Board made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Board may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the District Court of the United States for the District of Columbia. As part of its answer the Board shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Board, with or without remanding the cause for a rehearing. The findings of the Board as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Board as a decision is rendered under subsection (b) hereof which is adverse to an individual who was party to the hearing before the Board, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) hereof, the court shall review

only the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Board made before it files its answer, remand the case to the Board for further action by the Board, and may, at any time, on good cause shown, order additional evidence to be taken before the Board, and the Board shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm its findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which its action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions."

The services that were performed by Albert Miller & Co. at its warehouse at Burley during the years 1941 and 1942 were not exempted employment under the provisions of subsection (1) of Section 409, Title 42, U. S. C. A., which provides:

"(1) The term 'agricultural labor' includes all service performed . . .

(*l*) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife.

(2) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm.

(3) In connection with the production or harvesting of maple sirup or maple sugar or any commodity defined as an agricultural commodity in section 1141j (g) Title 12, as amended, or in connection with the hatching of poultry, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supply and storing water for farming purposes.

(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

As used in this subsection, the term 'farm' includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures

used primarily for the raising of agricultural or horticultural commodities, and orchards."

THE APPELLEE'S EMPLOYMENT WAS NOT EXCEPTED EMPLOYMENT.

Under the provisions of this subsection, before services in connection with the production of potatoes can be classed as exempted employment it must appear that such services were performed as an incident to ordinary farming operations or as an incident to the preparation of an agricultural commodity for market, before its delivery to a terminal market for distribution for consumption.

It is conceded that Albert Miller & Co. owned no land, leased no land and had no contracts for potatoes and was not engaged in farming. The appellee was employed and paid by Albert Miller & Co. and his services were not performed as an incident to ordinary farming operations.

Albert Miller & Co. was engaged in the commercial business of buying and selling potatoes. It purchased all the potatoes that it handled either from farmers or other dealers, all of which were sorted into grades U. S. No. 1 and U. S. No. 2 before they were transported to its warehouse at Burley. Albert Miller & Co. either transported or paid for the transportation of the potatoes from the farm to its warehouse. After they arrived at the warehouse, they were either stored for later sale, or were washed, resorted and classified, or sold without being washed, resorted or classified, as Albert Miller & Co. saw fit or deemed to be to its advantage.

The appellee performed no work upon or in connection with the potatoes while they remained upon the farm or in transporting the potatoes from the farm to the warehouse. His services were performed after the potatoes arrived at the warehouse.

In the case of Idaho Potato Growers vs. National Labor Relations Board, 144 Fed. (2nd) 295, it was held that cellar-warehouse crews which go to different farms and to dealers' warehouses and prepare potatoes for movement into market, are not agricultural laborers, excepted from definition of "employee" in the National Labor Relations Act. National Labor Relations Act, Sec. 2 (3), 29 U.S.C.A., Sec. 152 (3).

The farmer growers were entirely independent of Albert Miller & Co., and had no control over the potatoes after they were delivered to it upon the farm.

In the case of Latimer vs. United States, 52. F. Supp. 228, the Court said, "The fruit growers who are engaged in the care, cultivation, picking and delivery of the products of the orchard to be processed, graded, packed and marketed are engaged in agricultural labor and are exempt from the provisions of the statute. As soon as the fruit is delivered by the grower to the plaintiff for processing, grading, packing and marketing then the exemption ceases. The plaintiffs engaged in processing, grading and packing and marketing the fruit are engaged in industry and are therefore subject to the provisions of the Act and are not exempt as being engaged in agricultural labor. * * * Thus the stage of operations at which such services cease to be an incident to ordinary farm-

ing and become incidental to the commercial operations of the packing house is reached after the fruit has been picked and upon actual delivery of the fruit to the employees of the association for transmission to the packing house. The service of such employees then loses its 'agricultural' nature and is industrial in character and is an 'off the farm' incident to the business of the co-operative packing house as distinguished from farming operations."

In Miller vs. Bettencourt, 161 F. (2nd) 995, the Court said: "When this producer sold and delivered his product to this (Rosenberg) market he parted with all economic interest in it, and in its future form or destiny. This being true, as a matter of law, the labor of the appellee in the Rosenberg plant was not 'agricultural labor,' and the compensation she received from her employer was 'wages' within the meaning of the Act. Title 42 U.S.C.A., Sec. 409."

Not only have the federal courts within the Ninth Circuit so determined and defined what is and what is not agricultural labor, but the same has been defined by state courts under statutes defining agricultural labor similar to the definition by the federal statute. In the case of Cowiche vs. Bates, (Wash.), 117 Pac. (2nd) 624, the Supreme Court of Washington held that services performed by employees engaged in receiving, washing, sorting, packing and storing fresh fruits do not constitute "agricultural labor" within the provisions of the unemployment compensation act exempting agricultural labor from the operation of that act. The Court said, "When the product of the soil leaves the farmer, as such, and

enters a factory for processing and marketing it has entered upon the status of 'industry'."

This decision was attacked in the case of In re Yakima Fruit Growers Ass'n., (Wash.) 146 Pac. (2nd) 800. The respondents in the Yakima case contended that In re Wenatche Beebe Orchard Co., 16 Wash. (2nd) 259, 133 Pac. (2nd) 283, 284, (a case cited and relied upon by the appellant) either overruled or modified the Cowiche case. The Court said, "* * * the Cowiche case was an en Banc decision, while the Beebe case was a departmental holding. The rule of decision declared in the Cowiche case is binding on this court until authoritatively overruled. * * * The Beebe case does not, and was not intended to, authoritatively overrule the earlier decision in the Cowiche case." In the Yakima case the Court said: "When agricultural or horticultural products leave the farmer or grower, as such, and are brought to an independent factory or packing house for processing, grading, packing, and marketing, such products thereupon enter the status of 'industry,' and the services performed by the employees of the manufacturer or packing organization in processing, grading, packing, and marketing the fresh or raw products are not to be classed as 'agricultural labor' within the meaning of Section 19 (g) (6) (i) of Chapter 162, Laws of 1937, as amended by Section 6, chapter 214, Laws of 1939, but rather, are to be classed as employment in industry."

It follows that the services of the appellee for Albert Miller & Co. were not agricultural but were commercial,

performed for a commercial organization, engaged in handling agricultural products commercially, and that when the potatoes entered its warehouse they had entered commerce, and the producer had no control over their future form or destiny.

ALBERT MILLER AND COMPANY'S WAREHOUSE WAS A TERMINAL WAREHOUSE.

As used in the statute, a terminal market is a growers' market, the place where or the point of time when the grower of the crop parts with his economic interest in the product and control over its future form or destiny. Miller vs. Burger, 161 F. (2nd) 992.

Albert Miller & Co. was a private corporation, organized under the laws of the State of Illinois, to conduct purely commercial operations in the business of buying from farmers and thereafter selling the purchased product for its private profit after processing it.

The appellee testified: "These potatoes were bought by Albert Miller & Co. from the growers and they sent a crew out and sorted them U. S. No. 1 and No. 2. I didn't have anything to do with that. They went out here to the country and bought these potatoes U. S. No. 1 and No. 2 in the farmer's cellar, and paid him for them No. 1 and No. 2. They belonged to Albert Miller. They were out of the hands of the grower entirely. Then Albert Miller brings them into this warehouse where I worked, run them through the wash-

er, sorts them and repacks them, some of them in 100-pound sacks, and the big ones, the 8- and 10-ounces, put those in little bags, most of them 10-pound bags, some 25. They run them through this washer and washed them, and that's the work that I done. They are out of the hands of the grower entirely. They are in the hands of the speculator. Not only that, but in the fall of the year they had a big warehouse that would hold probably 50,000 sacks in the basement, and they went out to the farmers and bought these potatoes and paid for them. They sorted them in the country and brought them in and stored them in the warehouse, and a lot of those potatoes stayed in that warehouse 'till spring, and we had to sort them again. Those potatoes was ready for market when they were sorted out here in the country. They were U. S. No. 1 and U. S. No. 2. Most of the 2's we didn't have to do too much to them because they didn't put them in the bags so much. (Supp. Tr. 113-114.) The way they buy potatoes here, they pay so much for these potatoes sorted U. S. No. 1 and No. 2, and the buyer pays for the sorting and the sacks and the transportation." (Supp. Tr. 116.)

Louise Franden testified: "We did hire crews to go out and sort potatoes in the cellar. They were sorted out there, and were loaded into cars when they came in. However, when we'd buy bulk potatoes, maybe we'd buy a cellar. We'd measure the cellar and say that we'd give them so much and they were brought into the warehouse and sorted there. (Supp Tr. 157.) These potatoes all belonged to the Miller Company when they were brought into the warehouse and the Miller

Company then hired people to sort them. If he wanted to sell them in the celar so much for the whole cellar, we'd pay him for this amount, but if he wanted them sorted and graded by us, we would pay him afterwards. (Supp. Tr. 158-159.) They did store a lot of potatoes in the warehouse. (Supp. Tr. 161). The Miller Company paid for the sorting. We had a regular truck or two to use when the farmer didn't bring them in. (Supp. Tr. 162.) We did insist on having their social security number for purposes of income tax cross identification. (Supp. Tr. 164.)"

James Allen Fitts was employed by Albert Miller & Co. as warehouse manager at Burley, Idaho, for approximately four years and during the years of 1941 and 1942. His employment entailed buying, transporting, washing, sorting, storing, selling and shipping potatoes, and all other incidentals, including office management of the warehouse. He was authorized to purchase and sell potatoes. Approximately 60 per cent of the potatoes that were purchased were shipped to various points in the United States upon directions emanating from Albert Miller & Co. at Chicago, Illinois. Approximately 40 per cent of the potatoes purchased were sold *from the warehouse at Burley* by Fitts to local produce companies, local inter-state and intra-state transportation companies, stores, restaurants and private individuals, the price being left to the judgment of Fitts. (Supp. Tr. 83, 84, 85).

In his brief, on page 59, the appellant says, "The remaining forty percent of the potatoes were sorted and graded in the growers' cellars and were sold to local produce companies,

local interstate and intrastate transportation companies, restaurants, stores, and private individuals *without ever entering the warehouse.*"

This statement is contrary to the affidavits of Fitts, Anderson and Knight. Both Fitts and Anderson say they were sold from the warehouse at Burley, Idaho. (Supp. Tr. 84, 90.) Knight says, "That during the above mentioned months (November, December, 1941, January, February, March, April, May, September, October and November, 1942) during which he at various times purchased potatoes from the Albert Miller and Co. warehouse at Burley, Idaho, * * *."

Under the above testimony it cannot be successfuly contended that the warehouse of Albert Miller & Co. was not a grower's market, the place where or the point of time at which the grower of the crop parted with economic interest in or control over its future form or destiny. It was a point from which the potatoes were sold to consumers, either in carload lots or smaller quantities, both in interstate and intrastate commerce. It was the point where the potatoes entered upon their commercial destiny. It was a "terminal market."

MILLER VS. BURGER SHOULD NOT BE OVERRULED.

The appellant asks this Court to overrule the case of Miller vs. Burger. Just what he would like to have the Court do with the decision in the case of Idaho Potato Growers vs. National Labor Relations Board, 144 Fed. (2nd) 295, is

not apparent. Just how the Miller vs. Burger case can be overruled without overruling the Idaho Growers case is not clear. Certainly the position of the appellant does not now conform with the position of the Board in that case. The change of designation from "Board" to "Administrator" should not justify such a change in position.

A reading of the opinions, both in the district and this court, discloses that the Burger case and the Bettencourt case received careful consideration by this Court. The decisions in both the Miller vs. Burger and Miller vs. Bettencourt cases are fundamentally sound and have been approved by other courts. In the case of Producers Crop Imp. Ass'n vs. Dallman, 178 Fed. (2nd) 66, that court approved the ruling of the Burger case, under the facts in the Burger case, but held the facts in its case did not bring it within the rule of the Burger case. The Court of Appeals of the Seventh Circuit said, "We agree with that Court that under the admitted facts in this case, Rosenberg Bros.' plant was a terminal market for the farmer producers, who sold and delivered their dried fruits to that concern; that it was 'the market' of such farmer producers, or to state it in another way, 'the growers market,' since this commercial plant was the place where the farmer producer of dried fruit customarily parted with all of his economic interest in the fruit, its future form or destiny. The facts make abundantly clear that it was only after the farmer producer sold and delivered the fruit to Rosenberg Bros. that Burger's services (described in the opinion of the district court) were performed for that commercial concern".

The question received consideration by the Court of Appeals in the Fifth Circuit in the case of Chester C. Fosgate Co. vs. United States, 125 Fed. (2nd) 778, wherein the Court said: "Services in gathering crops and transporting them to market would ordinarily be in connection with harvesting and agricultural, because usually performed by or for the person who produces them. But touching crops that have to be processed before marketing, in recent years businesses have arisen that are more nearly mercantile and manufacturing than agricultural. Such businesses have increasingly tended to buy crops in the field or on the trees, thus cutting short the agricultural operations and transferring the harvest to the new business field. This is the rule in the citrus fruit business. This record states that Fosgate Company buys no fruit which it does not itself gather. The Regulation, Art. 206 (b), seeks to deal with such situations, and to declare that persons employed not by the producer of crops, but by a processor who has bought them after maturity, is rendering services 'in connection with processing.' rather than in connection with the cultivation of the soil, and his labor is not fairly agricultural. It does not mention expressly 'gathering,' but where the processing purchaser prefers to buy on the trees and do the gathering for himself, perhaps thinking he can do it better, and know the fruit is not bruised or scratched, we think it reasonable to hold, as the district court did, that the labor actually done in such gathering is closer to the mercantile enterprise of processing and marketing than it is to agriculture."

INSTANT CASE IS NOT DISTINGUISHABLE FROM MILLER VS. BURGER.

If the instant case were distinguishable from the Burger case, it is not apparent why the appellant is so insistent that the Burger case should be overruled. If this case is distinguishable from the Burger case, then a reversal of the judgment of the lower court would not overrule the Burger case but the two decisions would be distinguishable and would stand together. If the appellant were sincere in his contention that this case is distinguishable from the Burger case, then why all of the waste of time and space in his discussion of the Burger case? The fact is the case is not distinguishable from the Burger case, but is clearly controlled by the rule announced in the Burger case, and the decision of the lower court cannot be reversed without overruling the Burger case.

An attempt is made to distinguish the instant case on the theory that Idaho adopted the Uniform Sales Act in 1919. Section 64-203 of the Idaho Code in part provides:

> "*Time when property passes to buyer—Rules for ascertaining intention.*—Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:
>
> Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed." * * *

In the case of Johnson vs. Besoyan, (Cal.) 193 Pac. (2nd) 63, it is said:

> "Section 1739 of the same code (Civil Code) contains the following:
>
> 'Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.
>
> 'Rule 1. (Goods in deliverable state.) Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed'."

The instant case is not distinguishable from the Burger case, the ruling in the Burger case is controlling in this case and a reversal of the judgment of the lower court in this case would be tantamount to overruling the Burger case.